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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LAURA DEWEY,
Plaintiff and Respondent,

v.

SUSAN PETROVICH,
Defendant and Appellant.

2d Civil No. B175824
(Super. Ct. No. 1132299)
(Santa Barbara County)

LAURA DEWEY,
Plaintiff and Cross-Appellant,

v.

JAMES PETROVICH,
Defendant and Cross-Respondent.

Susan Petrovich (Susan) appeals from an order denying a special motion to strike her sister's complaint as a SLAPP suit (strategic lawsuit against public participation; Code Civ. Proc., § 425.16.)¹ The sister, Laura G. Dewey (Laura), cross-appeals from the order dismissing James Petrovich, Susan's husband. We affirm.

¹ Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

Facts and Procedural History

Susan and Laura are sisters and lawyers. After their mother died in 1997, Susan became the trustee of mother's living trust. Susan made a preliminary distribution and provided an accounting that included a \$105,965.17 credit for advancements to Laura. To facilitate administration of the trust, Laura executed a waiver of her share of the sale proceeds of some ranch property and stock.

Susan closed the trust on August 20, 1998, but withheld distribution of two items: a silver tea service and some German antique toys.

In 2002, Susan filed a \$3,803 small claims action against Laura for the board and care of Laura's horse. (*Petrovich v. Dewey*, Small Claims Case No. 1131856.)

Before the small claims action was tried, Laura filed a complaint for breach of trustee duties. (*Dewey v. Petrovich*, Sup. Ct. Santa Barbara County, Case No. 1132299.) The complaint stated that Susan had not accounted for and distributed all the trust assets and that James was in possession of trust property. The second cause of action alleged that Susan agreed to give Laura a \$100 credit towards the board and care of her horse each time Laura house sat for Susan.

The small claims action and Laura's complaint were consolidated and transferred to superior court. (§ 116.390, subd. (a).)

Susan and James demurred to the complaint and filed a special motion to strike under the anti-SLAPP statute. The trial court granted James' motion to strike but denied Susan's anti-SLAPP motion. Susan's demurrer was overruled.

Anti-SLAPP Statute

Section 425.16 provides, inter alia, that: "A cause of action against a person *arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue* shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1), emphasis added.)

As used in section 425.16, " 'act *in furtherance of a person's right of petition* or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law" (§ 425.16, subd. (e), emphasis added.)

Section 425.16 requires that the trial court engage in a two-step process in determining whether an anti-SLAPP motion should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) On review, we independently determine whether section 425.16 applies and whether the plaintiff has demonstrated a probability of prevailing on his or her complaint. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 44.)

Susan correctly argues that the small claims action is a protected activity within the meaning of section 425.16. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929 ["filing a lawsuit is an exercise of the constitutional right of petition"].) The anti-SLAPP statute has been broadly construed to include garden variety lawsuits filed by a defendant. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90-91; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) Although Laura's complaint appears to be retaliatory, it is a responsive pleading.

In *City of Cotati v. Cashman*, *supra*, 29 Cal.4th 69, our Supreme court held that cross-actions and responsive pleadings are not subject to the anti-SLAPP statute. "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Id.*, at pp. 76-77.) The court explained that the phrase " 'arising from' " in section 425.16, subdivision (b)(1) does not mean " 'in response to' " the underlying lawsuit. (*Id.*, at p. 77.) "To construe 'arising from' in section 425.16,

subdivision (b)(1) as meaning 'in response to,' as [Susan urges], would in effect render all cross-actions potential SLAPP's. We presume the Legislature did not intend such an absurd result. [Citation.]" (*Ibid.*)

Laura's complaint is responsive to the small claims action. (§ 116.390, subd. (a).) The second cause of action for breach of contract alleges: "Susan Petrovich agreed to give Laura Dewey the sum of \$100 as credit against horse boarding and care bill each time that Laura Dewey house-sat for Susan Petrovich." We reject the argument that the complaint arises from a protected speech or petitioning activity as defined by section 425.16, subdivision (b)(1). "[A] cross-complaint or independent lawsuit filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic." (*Kajima Engineering & Construction, Inc. v. City of Los Angeles, supra*, 95 Cal.App.4th at p. 924; see e.g., *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001 [causes of action alleging a direct contract between the parties not subject to anti-SLAPP statute, even though speech and petition activities alleged elsewhere in the complaint].)

Susan complains that the first cause of action for breach of fiduciary duty is barred by a three year statute of limitations (Prob. Code, § 16460, subd. (a)(1)) and is barred by Laura's waiver to the distribution of trust assets. We do not reach the issue because Susan has failed to make a threshold showing that the targeted activity, i.e., her actions as a trustee arise out of a written or oral statement made before a judicial proceeding. (§ 425.16, subd. (e); *Kajima Engineering & Construction, Inc. v. City of Los Angeles, supra*, 95 Cal.App.4th at p. 929.) The small claims action is not a trust matter. Nor is there evidence that Susan's trust accounting and distribution of trust assets was reviewed by a probate court.

"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 92.) Susan cites no authority that an alleged fraud by a

trustee is a protected activity or is an act in furtherance of the constitutional right of petition or free speech.

Order Dismissing James

Laura cross-appeals from the order granting James' anti-SLAPP motion. The complaint alleges, on information and belief, that James kept undistributed trust assets, i.e., the silver tea set and the German antique toys. James' motion makes a prima facie showing that the complaint is retaliatory and was filed because he intended to testify in the small claims action.²

Communications preparatory to or in anticipation of the bringing of an action are protected activities under the anti-SLAPP statute. (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.) James' communications as a witness in the small claims action is a protected activity within the meaning of section 425.16 subdivisions (e)(1) and (e)(2). "The right to petition . . . or to seek legal redress, does not confer legal protection solely on those persons . . . formally filing a lawsuit." (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17, fn. omitted.)

Laura's assertion that the complaint seeks damages based on James' noncommunicative conduct is without merit. (E.g., *Id.*, at pp. 18-20.) "[A] plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of

² Laura claims that she did not know that James intended to testify. We reject the argument because James need not show that Laura filed the complaint with the subjective intent to chill his First Amendment rights. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) " '[T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of h[is] right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits.' [Citation.]" (*Ibid.*)

combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.)

James has made a prima facie showing that the complaint arises from activity undertaken by him in furtherance of his constitutionally protected rights as a witness. Under section 425.16, subdivision (b)(1), the burden shifts to Laura to establish a probability of prevailing at trial. Stated another way, Laura " "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [Laura] is credited." ' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.)

It is undisputed that James is not a trustee or a trust beneficiary and has no say in the administration, accounting or distribution of the trust assets. The allegation, on information and belief, that he is in possession of trust property is not competent evidence. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1498.) Laura speculates that James may have "partial custody of at least one of the contested assets," but offers no competent admissible evidence.³ Her declaration states: "The issue over the horse bill is de minimis[], but it should not be decided until the court determines how much Susan Petrovich owes me. I brought this action to bring closure to my relationship with these three sisters, for the best of all concerned."

The pleadings and moving papers clearly show that James is not part of the trust dispute.⁴ Moreover, communications or statements by James as a witness are absolutely

³ Laura's opposition papers state: "According to the last information I had from Susan Petrovich, the silver [tea set] was in their possession. . . . Susan Petrovich has failed to specify who holds the German antiques."

⁴ Laura's reliance on *Moore v. Shaw* (2004) 116 Cal.App.4th 182 is misplaced. There an attorney was sued for drafting documents that enabled her client, a trustee, to breach a trust agreement. The Court of Appeal held that the attorney's conduct was not in

(Fn. cont'd.)

privileged. (Civ. Code., § 47, subd. (b); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The litigation privilege is designed "to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]" (*Id.*, at p. 213.)

The trial court properly found that there was no likelihood that Laura would prevail on her complaint against James. (E.g., *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 727-729.)

The order dismissing James is affirmed. James is awarded costs on appeal. The order denying Susan's anti-SLAPP motion is affirmed. Susan and Laura shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

(Fn. cont'd.)

furtherance of the right of petition or free speech. (*Id.*, at p. 195.) Laura's complaint does not allege that James assisted Susan in the management of the trust, breached a fiduciary duty, or acted as Susan's agent.

Zel Canter, Judge

Superior Court County of Ventura

Gary R. Ricks, Brigham J. Ricks; Ricks & Associates, for Appellant and
Cross-Defendant.

Laura G. Dewey, in pro per, Respondent and Cross-Appellant.